No. 85-926 (6)

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

THE CHRISTIAN BROADCASTING NETWORK, INC.,
*Petitioner,*

v.

COPYRIGHT ROYALTY TRIBUNAL,
*Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

## MOTION FOR LEAVE TO FILE BRIEF FOR RESPONDENTS IN SUPPORT OF PETITIONER OUT OF TIME AND BRIEF FOR RESPONDENTS OLD-TIME GOSPEL HOUR AND PTL TELEVISION NETWORK IN SUPPORT

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January 27, 1986

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No. 85-926

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

THE CHRISTIAN BROADCASTING NEWORK, INC.,
*Petitioner,*

v.

COPYRIGHT ROYALTY TRIBUNAL,
MOTION PICTURE ASSOCIATION AMERICA, INC., *ET AL.*
*Respondents.*

## MOTION FOR LEAVE TO FILE BRIEF FOR RESPONDENTS IN SUPPORT OF PETITIONER OUT OF TIME

Respondents Old-Time Gospel Hour (Old-Time) and PTL Television Network (PTL) herewith move for leave to file the attached brief in support of issuance of a writ of certiorari out of time. On December 19, 1985 at the request of two respondents (albeit in opposition) this Court extended the "time within which to file a response to the petition for a Writ of Certiorari ... to and including January 27, 1986, *for all respondents.*" (Emphasis added.) Respondents Old-Time and PTL interpreted that extenstion to embrace them. On advice of the Office of the Clerk that such was not the intent of the extension, Old-Time and PTL herewith request their inclusion in the foregoing extenstion.

On January 21, 1986, a copy of the manuscript of the Brief in Support was served on all other respondents, either by hand or by overnight mail. Thus, any parties who might oppose the Petition have been apprised of the text of Old-Time's and PTL's brief and therefore can in no way be

prejudiced should they wish to address its substance.

Respectfully submitted,

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January 27, 1986

## QUESTIONS PRESENTED

The questions presented for review are as set forth by Petitioner, The Christian Broadcasting Network, Inc. (CBN).

## LIST OF PARTIES

The list of parties in the consolidated cases below, Nos. 84-1230 *et al.* and 84-1519 *et al.* is as set forth by CBN.

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IN THE

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OCTOBER TERM, 1985

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NO. 85-926

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THE CHRISTIAN BROADCASTING NETWORK, INC.,
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COPYRIGHT ROYALTY TRIBUNAL,
*Respondent.*

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## BRIEF FOR RESPONDENTS OLD-TIME GOSPEL HOUR AND PTL TELEVISION NETWORK IN SUPPORT

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Respondents Old-Time Gospel Hour (Old-Time) and PTL Television Network (PTL)[1] herewith support the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by The Christian Broadcasting Network, Inc. (CBN), seeking review of the Opinion and Order filed August 20, 1985 jointly in *National Association of Broadcasters* v. *Copyright Royalty Tribunal*, D.C. Cir. Nos. 84-1230 *et al.* and in *The Christian Broadcasting Network, Inc.* v. *Copyright Royalty Tribunal*, D.C. Cir. Nos. 84-1519 *et al.*,

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[1] Formally incorporated as Heritage Village Church and Missionary Fellowship, Inc.

affirming the final determinations of the Copyright Royalty Tribunal (CRT or Tribunal) as to distributions of copyright royalties for cable television retransmission of copyrighted works for the years 1979, 1980 and 1982.

Respondents' brief in support of petitioner is submitted pursuant to Rule 19.6 of this Court.

## OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

The opinions below, jurisdiction, statutes involved and statement of the case are as set forth by CBN.

## REASONS FOR GRANTING THE WRIT

Old-Time and PTL concur with CBN's stated reasons for granting the writ, particularly with respect to the split between the Circuits. Indeed, those reasons are enhanced by focusing attention on the testimony of the Tribunal's then Acting Chairman in hearings on Copyright Royalty Tribunal Reform before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice. That testimony followed the Second Circuit's decision in *Acemla* v. *Copyright Royalty Tribunal*, 763 F.2d 101 (2d Cir. 1985). There it was decided that the Tribunal erred in permitting ASCAP and BMI, on the mere strength of an agreement and without presenting a case, to reap the spoils of all juke box royalties to which entitlement was not otherwise proven by a non-agreeing claimant. Hoping the District of Columbia Circuit would not follow suit, the Acting Chairman correctly predicted a split between it and the Second Circuit on the first issue advanced by CBN, *i.e.*, whether the Tribunal has authority to allocate royalty funds to claimants who have not proved their entitlement. Interestingly the Acting Chairman's solution to the impending conflicting decisions between the Circuits is to abolish judicial review in any Circuit but the District of

Columbia Circuit. The Tribunal's position is:

> *Judicial Review*. The Tribunal is currently faced with a potential split with the Second Circuit and the D.C. Circuit Courts of Appeals. The Second Circuit has recently decided a case involving the burden of proof of settling parties versus non-settling parties. The D.C. Circuit has a similar issue pending in another distribution proceeding. The Tribunal recommends that the Copyright Act be amended to allow that no court other than the United States Court of Appeals for the District of Columbia [Circuit] shall have jurisdiction to review a final decision of the Copyright Royalty Tribunal.[2]

As CBN points out, "The result reached below is in direct conflict with the Decision reached three months earlier by the Second Circuit in *Acemla* ..." *supra*. Legislative reform of the Copyright Royalty Tribunal is stalled, and there is no reason to suppose that the Tribunal's wish will come true. A split in the Circuits will remain, and absent unexpected Congressional action it can be presumed that appeals will be filed at Circuits other than the District of Columbia. Cable television royalty distributions are an annual event, now about $100 million each. So far there has never been a universal settlement among the claimants.[3] The matter of the "burden of proof of settling parties versus non-settling parties" is very likely to arise again in future years' litigation, especially inasmuch as heretofore the non-settling parties have not

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[2] Hearings on Copyright Royalty Tribunal Reform before the House Subcom. on Courts, Civil Lib. and Admin. of Justice, 99th Cong., 1st Sess. (Testimony of The Honorable Edward W. Ray, July 11, 1985 at p. 8) (Unpublished).

[3] Other than an agreement as to one year to accept the same percentage as finally awarded in another year.

occupied that position by choice but, instead, only in the face of unreasonable settlement offers.

As is set forth in the seminal treatise by Messrs. Stern and Gressman, certiorari jurisdiction has as one of its major purposes uniformity of decisions among federal courts of appeals, "hence a square and irreconcilable conflict of this nature *ordinarily* will be enough to secure review." R. Stern and E. Gressman, *Supreme Court Practice*, 265 (5th ed. 1978). Cited in support are *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557, 559 (1968) where this Court stated "[w]e granted the petition for certiorari . . . because of an apparent conflict between the decision below [by the Sixth Circuit] and [one] from the Court of Appeals for the Third Circuit." Also cited is *Northeastern Pennsylvania National Bank* v. *United States*, 387 U.S. 213, 217 (1967) where it was stated that "[b]ecause of an acknowledged conflict between . . ." the Third and Seventh Circuits "we granted certiorari." Clearly we have here an acknowledged direct conflict between the Circuits, the acknowledgment coming from no less than the Tribunal itself.

## CONCLUSION

For the reasons set forth above and by CBN the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 27, 1986

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Respondent's Motion for Leave to file Brief in Support, out of time, and Brief in Support of the Petition for Writ of Certiorari upon the persons indicated below by depositing same in the United States mail, first class postage prepaid, addressed to the following:

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